RECENT DEVELOPMENT

*Aviall, Inc. v. Ryder Systems, Inc.**

I. INTRODUCTION

In today's litigious society, many businesses have found it advantageous to include arbitration clauses in their business contracts.[1] While this can reduce time and expense litigating most problems, what happens when the bone of contention is the terms of the arbitration? Such is the case in *Aviall, Inc. v. Ryder Systems, Inc.*

Initially, the dispute in *Aviall* focused on how one party booked a financial transaction.[2] When submitted to arbitration, however, the issue grew much larger to "whether an arbitrator could honestly and fairly arbitrate a dispute between two companies when the arbitrator had (and continues to have) a pre-existing relationship with one of the parties?"[3] The matter wound up in litigation, first at the district court level[4] and then, on appeal, before the Second Circuit. The Second Circuit, consistent with precedent and the surrounding case law, held that a court could not remove an arbitrator for "potential" bias.[5]

II. BACKGROUND

This matter arose when Ryder System, Inc. (Ryder), a conglomerate of transportation businesses, decided to consolidate and "spin-off" its aviation related businesses under the name, Aviall, Inc. (Aviall) to Ryder's own shareholders.[6] Pursuant to this spin-off, officers and directors from Ryder and Aviall signed a contract known as the Distribution and Indemnity

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* 110 F.3d 892 (2d Cir. 1997).

[1] *See* Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 238 (1996).

[2] *See Aviall*, 110 F.3d at 894.

[3] *Id.* at 895.

[4] *See* Aviall, Inc. v. Ryder Systems, Inc., 913 F. Supp. 826 (S.D.N.Y. 1996).

[5] *See Aviall*, 110 F.3d at 895.

[6] *See id.* at 893.

Agreement (Distribution Agreement).[7] This agreement was consented to by both Ryder's and Aviall's Boards of Directors and was executed.[8]

The Distribution Agreement stipulated that Aviall was to have an initial net worth of $314 million.[9] To that end, the Distribution Agreement included a "Distribution Statement" devising how Aviall's and Ryder's assets were to be divided as well as the amount of debt repayments and dividends that Aviall would owe to Ryder in order to reduce Aviall's net worth to the targeted amount.[10]

Furthermore, section 3.03(c) of the Distribution Agreement required that "[i]f there are any items related to the Distribution Statement which are in dispute, then such items shall be submitted to KPMG Peat Marwick . . . for resolution."[11] In other words, Aviall and Ryder explicitly agreed to resolve any disputes contained in the Distribution Statement by arbitration before KPMG Peat Marwick. At the time of the spin-off, KPMG was the accountant for both Ryder and Aviall and, as such, was familiar with both the financial statements and the terms of the Distribution Statement.[12]

One item of particular note was that the Distribution Statement required Ryder to retain all pension assets and obligations of Aviall's employees up to the date of the spin-off, while Aviall would be responsible for all postdivestiture pension benefits.[13] Ryder then sought to record its pension liabilities to Aviall as a prepaid expense asset, thereby increasing Aviall's net worth by $17.6 million.[14] This would then allow Ryder to require Aviall to give up $17.6 million in other assets to Ryder in order to reduce Aviall's net worth back to the intended $314 million. KPMG, in its role as independent outside auditor, investigated and subsequently approved of Ryder's treatment of the pension benefits and certified Ryder's books.[15]

In December 1993, the spin-off was complete.[16] Shortly thereafter, Aviall replaced KPMG as its independent auditor and announced its

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[7] *See Aviall*, 913 F. Supp. at 828.

[8] *See Aviall*, 110 F.3d at 893-894.

[9] *See id.* at 894.

[10] *See id.*

[11] *Aviall*, 913 F. Supp. at 828.

[12] *See id.* at 829.

[13] *See id.*

[14] *See Aviall*, 110 F.3d at 894.

[15] *See Aviall*, 913 F. Supp. at 829.

[16] *See Aviall*, 110 F.3d at 894.

objection to Ryder's allocation of the pension benefits.[17] Then, in November 1994, after several months of negotiations, Aviall notified Ryder that Aviall was officially disputing the allocation of the pension benefits.[18] Pursuant to section 3.03(c) of the Distribution Agreement, Aviall sought arbitration before KPMG.[19] In preparation for the arbitration, Ryder sought and received some assistance from KPMG.[20] Then, in December 1994, Aviall requested that KPMG withdraw as arbitrator and, when KPMG refused, Aviall filed a complaint with the district court.[21]

III. PROCEDURAL HISTORY

Aviall's initial complaint sought a declaration from the court system that KPMG be prohibited from arbitrating the dispute.[22] Ryder responded by moving the district court to dismiss Aviall's complaint under Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, to stay the litigation pending the outcome of the arbitration.[23] After discovery, both parties moved for summary judgment.[24] Aviall argued that the Distribution Agreement was a "contract of adhesion" and therefore not enforceable.[25] Alternatively, Aviall argued that, under the Federal Arbitration Act (FAA),[26] the district court has the power (and the duty) to remove an arbitrator who is "biased or evidently partial."[27]

First, based upon relevant case law, the district court determined that this was not a contract of adhesion.[28] Despite claiming that the negotiation process employed by Ryder was oppressive, Aviall was unable to produce any evidence of high-pressure tactics or procedural unfairness.[29] Further, although Aviall may not have been represented by independent counsel at the negotiation of the Distribution Agreement, Aviall did have an officer

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[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.* at 894–895.

[21] *See Aviall*, 913 F. Supp. at 830.

[22] *See Aviall*, 110 F.3d at 895.

[23] *See id.*

[24] *See id.*

[25] *See Aviall*, 913 F. Supp. at 831.

[26] 9 U.S.C. §§ 1–16 (1994).

[27] *Id.* at 833.

[28] *See id.* at 831–833.

[29] *See id.* at 832.

sign the contract and the contract was unanimously approved by Aviall's Board of Directors.[30] Additionally, Ryder's conduct was entirely consistent with traditional principles of corporate governance.[31] Finally, Aviall was unable to produce any case law suggesting that the process employed by Ryder was unduly oppressive or in violation of public policy.[32]

Second, based upon the statutory language of section 10 of the FAA, the district court found Aviall's action to be premature. As a matter of law, the district court found that courts are only permitted to remove arbitrators when "[(1)] one party has deceived the other, [(2)] unforeseen intervening events have frustrated the intent of the parties, or [(3)] the unmistakable partiality of the arbitrator will render the arbitration a mere prelude to subsequent litigation."[33] Based upon the evidence, the district court found that there was no deception, unforeseen intervening events, or unmistakable partiality on the part of the arbitrator.[34] Given these facts, the district court held that it could only adjudicate the partiality of an arbitrator *after* the arbitrator had exercised her duties and not before.[35]

Therefore, on February 7, 1996, the district court granted Ryder's motion for summary judgment.[36]

IV. THE SECOND CIRCUIT AFFIRMED THE DECISION OF THE DISTRICT COURT

Aviall appealed the district court's interpretation of the FAA, primarily arguing that the FAA grants courts the authority to disqualify arbitrators who have demonstrated bias or evident partiality and that KPMG's relationship with Ryder, as well as KPMG's conduct in connection with this dispute, demonstrates this partiality.[37]

Similar to the district court, the Second Circuit found the FAA to be the relevant statutory authority.[38] The FAA explicitly provides that "[a] written provision . . . evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

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[30] *See id.*

[31] *See id.*

[32] *See id.* at 833.

[33] *Id.* at 836.

[34] *See id.*

[35] *See id.*

[36] *See id.* at 826, 836.

[37] *See Aviall*, 110 F.3d at 895.

[38] *See id.*

transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[39] The Second Circuit interpreted this as strongly suggesting that the legislature did not intend for courts to tread upon and interfere with legitimate contracts detailing arbitration.[40]

The FAA does not, however, strictly prohibit all judicial interference with the decision of an arbitrator.[41] Section 10 of the FAA—incidentally, the only section which discusses judicial interference with an arbitrator's award—allows courts to vacate an arbitrator's award under the following specific circumstances:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
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> (1) Where the award was procured by corruption, fraud, or undue means.
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> (2) Where there was *evident partiality or corruption in the arbitrators*, or either of them.
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> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of *any other misbehavior by which the rights of any party have been prejudiced.*[42]

Perhaps more importantly, the FAA does not provide for any pre-award removal of an arbitrator.[43] As precedent, the Second Circuit cited its decision in *Michaels v. Mariforum Shipping, S.A.*,[44] where it held that, "a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award."[45]

Aviall had supported its argument in favor of allowing courts to remove arbitrators prior to executing their duty by citing a variety of cases.[46] The Second Circuit, however, characterized these cases as only calling for the pre-award removal of an arbitrator when the agreement to arbitrate would

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[39] 9 U.S.C. § 2 (1994).

[40] *See Aviall*, 110 F.3d at 895.

[41] *See id.*

[42] 9 U.S.C. § 10 (1994) (emphasis added).

[43] *See Aviall*, 110 F.3d at 895.

[44] 624 F.2d 411 (2d Cir. 1980).

[45] *Id.* at 414 n.4.

[46] *See Aviall*, 110 F.3d at 895-896.

be invalid under general contract principles.[47] In *Erving v. Virginia Squires Basketball Club*,[48] one of the cases cited by *Aviall*, the parties entered into a contract requiring any dispute to be resolved by a neutral arbitrator—the Commissioner of the American Basketball Association (Association).[49] When Julius Erving brought forth his complaint, however, the original Commissioner had been replaced by Robert S. Carlson, a partner in the law firm representing the defendant.[50] This result was neither intended nor contemplated at the time the parties agreed to this arbitration clause. Thus, the district court removed the arbitrator because the parties did not foresee this result and their intent of having a neutral arbitrator was being frustrated.[51] Contrast this to the facts determined by the district court in *Aviall*—the parties' overriding purpose in selecting KPMG as arbitrator was not neutrality; the parties' primary goal was to select an arbitrator who was knowledgeable about both companies' financial statements and the terms of the Distribution Agreement.[52] Therefore, the guidance set forth by the district court in *Erving* was no longer relevant because, in *Aviall*, the parties were neither surprised, nor was their intent frustrated by the naming of KPMG as arbitrator.[53]

Aviall also cited the court's decision to remove the arbitrator in *Masthead Mac Drilling Corp. v. Fleck*.[54] In *Masthead Mac*, however, the district court found that the defendant hid the fact that the contractually designated arbitrators were past or present business associates of the defendant.[55] By concealing the arbitrator's true relationship with the parties, the defendant acted fraudulently.[56] Due to this fraud, the court decided to remove the arbitrator prior to the execution of the arbitrator's duties.[57] In *Aviall*, however, the parties were completely knowledgeable about KPMG's business relationship with both Ryder and Aviall; there was

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[47] *See id.* at 896.

[48] 349 F. Supp. 716 (E.D.N.Y. 1972).

[49] *See id.* at 717–718. It should be noted that this is how the Second Circuit characterized the facts of the case. Whether this is a fair interpretation of the facts is discussed *infra* Part V.

[50] *See Erving*, 349 F. Supp. at 719.

[51] *See id.*

[52] *See Aviall*, 913 F. Supp. at 835.

[53] *See id.*

[54] 549 F. Supp. 854 (S.D.N.Y. 1982).

[55] *See id.* at 856.

[56] *See id.*

[57] *See id.*

no fraudulent concealment.[58] Therefore, the Second Circuit also found that the guidance set forth by *Masthead Mac* was not relevant.[59]

In fact, *Third National Bank v. WEDGE Group, Inc.*[60] is the only case cited by *Aviall* in which a court removed an arbitrator whose relationship with one party was both disclosed and foreseen. The district court in *WEDGE* based its decision on section 10 of the FAA, *Erving*, and *Masthead Mac*.[61] Without much discussion, the district court in *WEDGE* interpreted section 10 of the FAA as allowing the court to remove an arbitrator who was evidently partial.[62] Then, based upon *Erving* and *Masthead Mac*, the *WEDGE* court concluded that "[w]here the potential bias of a named arbitrator makes arbitration proceedings a prelude to later judicial proceedings challenging the arbitration award, a court can appoint a neutral substitute arbitrator."[63]

The Second Circuit ignored the *WEDGE* decision because the Second Circuit had come to vastly different interpretations of section 10 of the FAA, *Erving*, and *Masthead Mac*. First, the Second Circuit had interpreted *Erving* and *Masthead Mac* as only permitting the removal of an arbitrator prior to an award when the arbitrator's relationship with one of the parties was not foreseen or fully disclosed.[64] Second, the Second Circuit had interpreted section 10 of the FAA as not providing for the pre-arbitration removal of an arbitrator.[65]

The Second Circuit also found it significant that Aviall had complete knowledge of Ryder's relationship with KPMG when Aviall agreed to the pertinent arbitration clause.[66] Aviall was "fully aware of KPMG's relationship with Ryder when the Distribution Agreement was executed."[67] At the time of the agreement, it was just as likely that Aviall would have continued to retain KPMG while Ryder would not. In retrospect, Aviall probably regretted its decision to stipulate KPMG as an arbitrator, but the fact remains that KPMG is the arbitrator Aviall bargained for and there is nothing in contract law that prohibits a party from binding themselves to a

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[58] *See id.*

[59] *See id.*

[60] 749 F. Supp. 851 (M.D. Tenn. 1990).

[61] *See id.* at 854.

[62] *See id.*

[63] *Id.* at 855.

[64] *See Aviall*, 110 F.3d at 896.

[65] *See id.*

[66] *See id.*

[67] *Id.*

bad contract.[68] Most importantly, however, the FAA explicitly resists judicial interference when two parties have a written provision detailing how and by whom disputes are to be resolved.[69]

Furthermore, Aviall could not argue that the Distribution Agreement did not represent a meeting of the minds or that Aviall did not contemplate a future in which either Aviall or Ryder would not maintain its business relationship with KPMG. In fact, the Distribution Agreement clearly contemplated the possibility that KPMG would not remain the outside independent auditor of both parties, but still remain the designated auditor.[70] For example, the mere fact that other arbitration clauses exist, such as section 3.11(n) of the Distribution Agreement and section 5.04 of the Tax Sharing Agreement, suggests that the parties contemplated different kinds of arbitrators for different kinds of disputes. Further, unlike the arbitration clause in section 3.03(c) which designates KPMG as arbitrator of all disputes arising under the Distribution Statement, sections 3.11(n) and 5.04 make provisions for selecting an arbitrator if KPMG is no longer the independent auditor for both companies.[71] Finally, the Second Circuit did not disturb the district court's finding that, based upon the evidence, section 3.03(c) was not drafted to reflect the parties' intent to appoint, nor desire for, a neutral arbitrator.[72] Rather, this section "reflects an intent to have the person most familiar with the technical underpinnings of any dispute relating to the Distribution Statement resolve those disputes."[73]

The Second Circuit found the argument that Aviall did not have a real opportunity to negotiate the terms of the Distribution Agreement to be without merit because Aviall could not point to any infirmities in the

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[68] *See* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 374-375 (1990).

> The rise of the bargain theory has contributed to this reluctance [of "policing" contracts based upon fairness] by helping to strip from the doctrine of consideration any vestige of concern with the substance of the exchange on which the parties had agreed, thereby eliminating a possible basis for policing the agreement for substantive unfairness. The doctrine of consideration shields the promissor from liability if the promise is gratuitous, but not if the promissor has received something, however small, by way of bargained for exchange.

Id.

[69] *See* 9 U.S.C. § 2 (1994).

[70] *See Aviall*, 110 F.3d at 896.

[71] *See id.*

[72] *See* Aviall, Inc. v. Ryder Systems, Inc., 913 F. Supp. 826, 835 (S.D.N.Y. 1996).

[73] *Id.*

drafting process.[74] Ryder, meanwhile, had a fiduciary duty to draft the terms of the Distribution Agreement in terms most advantageous to its shareholders—the same individuals who would also be the shareholders of the new entity Aviall.[75] In a spin-off transaction, officers of a subsidiary owe a fiduciary duty only to the parent corporation, and neither the parent's nor the subsidiary's officers owe a duty to prospective shareholders.[76] Further, none of Aviall's initial shareholders were harmed by the Distribution Agreement; any injury they might have suffered by the reduction in Aviall's net worth would be offset by the increase in Ryder's value.

V. FURTHER ANALYSIS

The Second Circuit's decision appears to be correct. In addition to the reasoning put forth by the Second Circuit, the decision can be supported on other grounds. First, the decision follows the words of the statute. If the statute so provided, the court could remove an arbitrator prior to the arbitrator rendering a decision. The statute, however, limits the court to "vacating the award,"[77] not "vacating an arbitrator." The only way a court could "vacate the award" would be for the court to wait for the arbitrator to actually make an award so that the court would have something to vacate. Therefore, the Second Circuit's interpretation of the FAA follows the letter of the statute, only permitting interference with an arbitrator's decision after the arbitrator has had the opportunity to execute her duty.

Furthermore, this interpretation of the FAA is consistent with the goal of judicial economy. If, for example, courts were to attempt to resolve the impartiality of arbitrators before the fact, courts would spawn "endless litigation and unnecessarily delay the resolution of disputes."[78] Courts would be asked to review an arbitrator both before and after the actual arbitration. Attempting to determine the impartiality of an arbitrator prior to actually making a decision, would be very difficult because of the paucity of available evidence. After the arbitration, on the other hand, there would be a substantial record upon which to adjudicate the arbitrator's

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[74] *See Aviall*, 110 F.3d at 896.

[75] *See id.*

[76] *See id.* at 896 (citing Andarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171 (Del. 1988)).

[77] 9 U.S.C. § 10 (1994).

[78] Marc Rich & Co. v. Transmarine Seaways Corp., 443 F. Supp. 386, 387–388 (S.D.N.Y. 1978).

impartiality. While it is true that an arbitrator who is partial must recuse himself, that decision is best left to the discretion and good judgment of the individual arbitrator and not to the court, at least before an award is rendered.[79] Therefore, from the standpoint of judicial economy, the Second Circuit's interpretation of the FAA appears accurate.

Finally, this interpretation of the statute follows common sense. Prior to the arbitrator executing her function, the court can only use the past to make an informed guess regarding whether or not the arbitrator will act impartially. Without a crystal ball, until the arbitrator has actually rendered a decision, the court does not have any evidence upon which to decide whether the arbitrator has demonstrated "evident partiality."

One possible criticism of the Second Circuit's opinion is that it does not fairly characterize the facts in *Erving*. The Second Circuit asserts that this case can be distinguished from the case at hand because the intent of the arbitration clause in *Erving* was to establish a purely neutral arbitrator and that the arbitrator named in the contract was not foreseen by both parties.[80] In *Erving*, the arbitration clause reads as follows:

> 13. Arbitration. In the event of any dispute arising between the PLAYER and the CLUB relating to any matter or thing whatever, whether or not arising under this Contract, or concerning the performance or interpretation thereof, such dispute shall be determined by arbitration before the Commissioner of the American Basketball Association, or a person designated by such Commissioner in writing for such purpose, acting as Arbitrator. . . . The PLAYER and the CLUB hereby grant such Arbitrator full power to determine such dispute in such manner as he shall direct, and under such rules of procedure as he shall in his sole discretion adopt, and his decision shall be final, binding and conclusive and may be enforced in any court, state or [f]ederal, having competent jurisdiction.[81]

The district court's opinion does not include any evidence suggesting what the primary intent of the parties was beyond the text of the clause. The Second Circuit provides no evidence to support its assertion that neutrality was the primary intent of the parties. In fact, the Commissioner was an employee of the Association and, as such, was hired by and ultimately responsible to the owners of the different basketball franchises

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[79] *See Aviall,* 110 F.3d at 895 (citing Florasynth, Inc. v. Pickholz, 750 F.2d 171, 174 (2d Cir. 1984)).

[80] *See id.*

[81] Erving v. Virginia Squires Basketball Club, 349 F. Supp. 716, 718 (E.D.N.Y. 1972).

within that league. As Commissioner, his primary responsibility was to protect the interests of the league. Losing a player of Erving's caliber to a competing basketball league would have caused irreparable harm to the Association. Furthermore, it may not be entirely coincidental that, when the initial Commissioner stepped down, he was replaced by a partner of the legal counsel for one of the basketball franchises.

Finally, when the district court ordered that the arbitrator be replaced, the court did not state that this was because Carlson, then the present Commissioner, was incapable of being impartial or that, when the contract was formed, the parties did not foresee that a partner of one party's legal counsel would be the arbitrator.[82] The decision simply ordered that "[u]nder the circumstances arbitration should proceed before a neutral arbitrator and the order so provides."[83] In fact, at the time the contract was signed, the parties could foresee that the person designated by the contract to arbitrate their disputes was (1) hired to ensure the success and protect the interests of the Association and (2) ultimately hired (and could be fired) by the owners of the Association's basketball franchises. In that respect, circumstances of the Commissioner and KPMG seem to be very similar.

Nevertheless, the cases cited by *Aviall* which lend the most support to Aviall's position, *WEDGE* and *Erving*, are both district court opinions; the Second Circuit is not bound by their precedent.[84]

VI. *AVIALL*'S EFFECT ON THE LAW

The Second Circuit's decision in *Aviall* has been followed in subsequent district court decisions within the Second Circuit. In *Diemaco v. Colt's Manufacturing Co.*,[85] for example, the plaintiff sought an order from the district court compelling Colt to enter into arbitration with the original panel of arbitrators.[86] The district court refused to make such an order, holding that a court may only intervene in an ongoing arbitration if the

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[82] *See id.* at 719.

[83] *Id.*

[84] Arguably, *Aviall* does cite Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972), as supporting its position. The Second Circuit's opinion in *Erving*, however, is limited to an appeal of the injunction granted by the district court and a review of Erving's claim of fraud. *See id.* at 1066. Whether the district court had properly interpreted the FAA was not at issue.

[85] No. 3: 98CV523 (PCD), 1998 WL 381610 (D. Conn. June 26, 1998).

[86] *See id.* at *2.

arbitration agreement would be invalid under general contract principles.[87] The district court went on to state that, "generally, parties to an ongoing arbitration must await the award before seeking judicial review. Postaward review is limited—parties may only move to vacate the award based on one of the grounds set forth in section 10 of the FAA."[88]

In addition, the Second Circuit's decision in *Aviall* has been followed by the U.S. District Court for the Northern District of Illinois. In *In re Certain Underwriters at Lloyd's, London*,[89] the court found that the arbitration clause in question was governed by the FAA and that, under this law, "courts do not have authority to hear pre-award challenges to an arbitrator designation on grounds of bias and partiality"[90] and may only disqualify pre-award arbitrators when the agreement to arbitrate would "be invalid under general contract principals."[91]

Finally, *Aviall* has been cited by many courts on other grounds,[92] ranging from the mundane (the court's role in competing motions for proper grounds of summary judgment)[93] to the more complex (resolving whether res judicata or issue preclusion apply).[94]

VII. CONCLUSION

Based upon precedent and statutory law, the Second Circuit held that "an agreement to arbitrate before a particular arbitrator may not be disturbed, unless the agreement is subject to an attack under general contract principles as exist at law or equity."[95] An arbitrator cannot be

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[87] *See id.* at *4.

[88] *Id.*

[89] No. 97C 3638, 97C 3643, 1997 WL 461035 (N.D. Ill. Aug. 11, 1997).

[90] *Id.* at *3.

[91] *Id.* at *3 (quoting Aviall, Inc. v. Ryder Systems, Inc., 110 F.3d 892, 896 (2d Cir. 1997)).

[92] The Supreme Court of Alabama has cited to the Second Circuit's decision in *Aviall* to support the notion that an agreement to arbitrate must be entered into freely by both parties. *See* Investment Management & Research, Inc. v. Hamilton, No. 1960138, 1998 WL 122737, at *7 (Ala. Sup. Ct. Mar. 20, 1998); Allstar Homes, Inc. v. Waters, 711 So. 2d 924, 929 (Ala. Sup. Ct. 1997).

[93] *See* Frooks v. Town of Cortlandt, 997 F. Supp. 438, 449 (S.D.N.Y. 1998); Rosenthal A.G. v. Ritelite, Ltd., 986 F. Supp. 133, 139 (E.D.N.Y. 1997).

[94] *See In re* DG Acquisition Corp. v. Dabah, 151 F.3d 75, 85-86 (2d Cir. 1998); United States v. Merit-Meridian Const. Corp., No. 90 Civ. 5106(DC), 1998 WL 549570, at *3 (S.D.N.Y. Aug. 28, 1998).

[95] Aviall, Inc. v. Ryder Systems, Inc., 110 F.3d 892, 895 (2d Cir. 1997).

removed prior to an award unless the contract is somehow invalid. Where an arbitrator's relationship is "undisclosed, or unanticipated and unintended," the contract may be invalid.[96]

In reality, however, this decision is an opportunity for the Second Circuit to tell drafters what the court wants to see in future arbitration clauses: what the parties are looking for in an arbitrator (e.g., neutrality, highly informed, technical expertise) and who the parties foresee arbitrating their dispute. The courts have recognized a public policy in favor of arbitrating disputes rather than litigating them. Therefore, if a contract is valid and enforceable, the courts will avoid interfering.

Eric Fink

[96] *Id.* at 896.